Hastings Law Journal

Volume 57 | Issue 3 Article 3

1-2006

Reconstructing Family Privacy

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INTRODUCTION

In the past decade, numerous state and local agencies have adopted policies of removing children from their mothers' custody because the children witnessed or could have witnessed their mothers being abused by husbands, boyfriends, or other intimates.[1] In the Eastern District of New York class action lawsuit *Nicholson v. Williams*,[2] domestic violence victims and their children sought injunctive relief from such a policy of New York's child protection agency.[3] In a lengthy decision, Judge Jack B. Weinstein of the Eastern District of New York preliminarily enjoined such custody removals on, among other bases, Fourteenth Amendment substantive due process grounds predicated on a robust notion of "family privacy" protecting the mothers and their children.[4]

Commentary about the case has tended to criticize the custody removal policy on theoretical, policy, and empirical grounds.[5] This

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1. *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003) (describing prevalence of removal of children from battered mothers); Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution when Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1489–1501 (2001) (discussing proliferation of "failure to protect" actions against battered mothers); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1 (2001) (discussing statutory approaches to protecting children from exposure to domestic violence).

2. Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002). The case is entitled *Nicholson v. Williams* in the district court and *Nicholson v. Scoppetta* on appeal. For ease of reference, I refer to the case in its entirety as "*Nicholson v. Williams*" or "*Nicholson*."

3. *In re* Nicholson, 181 F. Supp. 2d 182 (E.D.N.Y. 2002); *Nicholson*, 203 F. Supp. 2d 153.

4. *See generally* Nicholson v. Williams, 203 F. Supp. 2d 153.

5. *See, e.g.*, Maureen K. Collins, Comment, *Nicholson v. Williams: Who is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725 (2004); Justine A. Dunlap, *The "Pitiless Double Abuse" of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL'Y & L. 523 (2003); Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251 (2003); Leigh

Article, however, attempts to broaden the discourse surrounding the case by situating the district court's conception of family privacy in the context of active debates within feminist legal theory about the proper role of privacy norms in regulating domestic spheres. While many feminist legal theorists have critiqued the allocation of legal power based on "formalist" divisions of society into "public" and "private" spheres, in part for the legal cover such assumptions have given to violence in the home, the case presents a unique opportunity to reconsider the instrumental and normative value of the "public-private" distinction and norms of privacy.

Legal reform regarding domestic violence is born fundamentally of skepticism toward the "public-private" distinction and privacy's subordination of wives and mothers in the domestic sphere. Feminists have disagreed, however, about the implications of this "deconstruction" of the "public-private" distinction. For some radical feminists, privacy is a specious basis for claiming rights pertaining to women because it is inherently gendered and patriarchal. Liberal feminists, on the other hand, have argued that the notion of privacy does indeed have real value for protecting individuals' and women's autonomy and personhood. In contrast to radical scholars who have argued against basing individual rights on privacy grounds at the expense of anti-subordination principles, liberal feminists point to the value of privacy as a shield against governmental and societal coercion and as a way to promote women's welfare.

I defend privacy's value for women and argue that *Nicholson* presents one possibility for bridging skepticism of and commitment to privacy norms in the domestic context. On one hand, the court easily inhabits the space that feminist discourse and legal reform have carved out for legal intervention into domestic violence. The court does so, in part, by acknowledging systemic failures to recognize this "private" problem, vigorously engaging the social and psychological dimensions of domestic violence and child welfare protection, and addressing the subordinating effects of custody removals. The court thus demonstrates commitment to the feminist public-private critique that has fueled the domestic violence movement. On the other hand, the opinion's substantive due process analysis reflects a clear commitment to domestic

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Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004); Meier, *supra* note 1; Melanie Margarida Nowling, *Protecting Children Who Witness Domestic Violence: Is* Nicholson v. Williams *an Adequate Response?*, 41 FAM. CT. REV. 517 (2003); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176 (2004); Trepiccione, *supra* note 1; Weithorn, *supra* note 1; Heidi A. White, *Refusing to Blame the Victim for the Aftermath of Domestic Violence:* Nicholson v. Williams *is a Step in the Right Direction*, 41 FAM. CT. REV. 527 (2003).

privacy norms to protect the parent-child relationship from state intrusion. These two conceptual strands form a reconstructed view of privacy, disengaged from its gendered origins, that aims to protect the relationship between caregiver and child.

I argue, however, that while this reconstructed view of privacy is not necessarily gender-subordinating, it might not protect children's welfare as fully as possible. The approach may under-serve children when the contest between parental control and children's protection is closer than in *Nicholson*. The case thus raises concerns that the public-private distinction—no matter how drawn—inherently poses problems of coercion for those with less power within so-called private spheres.

Part I of this Article provides background on the *Nicholson* litigation. Part II describes the *Nicholson* district court's discussion of family privacy and parental autonomy. Part III sets forth the critiques of the public-private dichotomy, as articulated by legal realists and feminist scholars, and situates these critiques in relation to the domestic violence movement. It then discusses radical feminism's rejection of privacy as a basis for asserting rights, and contrasts it with liberal feminism's defense of privacy. Part IV turns to judicial perspectives on motherhood, which have served as a foundation for traditional privacy and contrast with *Nicholson*'s less gendered perspective. Finally, Part V examines how *Nicholson* presents possibilities and limits for reconstructing privacy independent of its gender-subordinating roots.

I. BACKGROUND—*NICHOLSON V. WILLIAMS* LITIGATION

In April 2000, Sharwline Nicholson, on behalf of herself and her two children, brought an action pursuant to 42 U.S.C. § 1983 against New York City's Administration for Children's Services (ACS).[6] The action was later consolidated with similar complaints by Sharlene Tillet and Ekaete Udoh.[7] These three named plaintiffs were mothers whose children had been removed by ACS, either temporarily or permanently.[8] The remaining plaintiffs were children who had been "removed by ACS, either temporarily or permanently, from the custody of their parents."[9] In the case of each plaintiff, at least one ground "for removal was that

6. Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004). The State of New York has the power to monitor and protect against abuse or neglectful treatment of New York's children. Nicholson v. Scoppetta, 344 F.3d 154, 158 (2d Cir. 2003). Generally, enforcement of child protection laws is carried out by counties and municipalities. *Id.* In New York City, the ACS bears primary responsibility for child protection. *Id.* ACS cooperates with a number of public and private entities, which provide it with data and other support, in partnership with the Family Court, which ultimately approves ACS's enforcement decisions. *Id.* A state agency, the Office of Children and Family Services (OCFS), also supervises ACS. *Id.*

7. *Nicholson*, 344 F.3d at 161.

8. *Id.*

9. *Id.*

the custodial mother had been assaulted, . . . and had failed to prevent the child or children from being 'exposed' to the incident of violence."[10]

The plaintiffs alleged that ACS, as a matter of policy, removed children from mothers who were victims of domestic violence without probable cause and without due process of law because, as victims, they purportedly "engaged in domestic violence."[11] The plaintiff mothers alleged that this process and its implementation constituted, *inter alia*, an unlawful interference with their liberty interest in the care and custody of their children in violation of the United States Constitution.[12]

In August 2001, the United States District Court for the Eastern District of New York certified two subclasses—battered custodial parents[13] (Subclass A) and their children (Subclass B).[14] Subclass A was defined as "custodians of children removed or sought to be removed by ACS, with or without court order, 'wholly or in part because the children reside in a home where battering of the custodian was said to have occurred.'"[15] The class was limited to cases in which the children were not physically harmed, threatened with harm, or neglected by the

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10. *Id.*

11. *Id.* at 172–73.

12. *Id.*

13. The court stated that "[a]lthough subclass A may include males, most members are female." *In re* Nicholson, 181 F. Supp. 2d 182, 184 (E.D.N.Y. 2002).

14. Nicholson v. Williams, 205 F.R.D. 92, 95, 101 (E.D.N.Y. 2001).

15. *Nicholson*, 344 F.3d at 161 (citing *In re Nicholson*, 181 F. Supp. 2d at 183–84). Subclass A consisted of:

> All persons subject to domestic violence or its threat who are custodians of children, legally or de facto, if:
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> 1. the children reside or resided in a home where battering was said to have occurred, but where the children themselves have not been physically harmed by the non-battering custodian or threatened with harm by the non-battering custodian, or neglected by the non-battering custodian, and where protection of the children and their best interests can be accomplished by separation of the alleged batterer from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian; and if,
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> 2. the children are sought to be removed or were removed by the New York City ACS or other governmental agency without court order (even if removal is ultimately approved by a court), wholly or in part because the children reside in a home where battering of the custodian was said to have occurred; or
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> 3. the custodian is named as a respondent by ACS in child protective proceedings by ACS under Article 10 of the New York Family Court Act in which removal may be sought (even if removal is ultimately approved by a court), wholly or in part because the children reside in a home where battering of the custodian was said to have occurred; or
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> 4. the custodian is denied adequate counsel;
>
> a) in proceedings required by law before ACS which may confirm or lead to removal of a child or failure to promptly return a removed child; or
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> b) in court proceedings where ACS is a party, which may confirm or lead to removal of a child or failure to promptly return a removed child.

In re Nicholson, 181 F. Supp. 2d at 183–84.

nonbattering custodian, and where "protection of the children and their best interests can be accomplished by separation of the alleged batterer from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian."[16] Subclass B was defined as the children of the custodial parents in subclass A.[17]

After plaintiffs moved for a preliminary injunction in June 2001, the court summarized expert evidence addressing how children are affected by the presence of domestic violence in the home.[18] Experts agreed that children can be, but are not necessarily, affected negatively by witnessing domestic violence.[19] Experts pointed to a number of factors influencing "how an individual child responds to being exposed to domestic violence," including the level of violence in the family, "the degree of the child's exposure to the violence, the child's exposure to other stressors, the child's individual coping skills," the child's age (younger children being more vulnerable), "the frequency and content of what the child saw or heard, the child's proximity to the event, the victim's relationship to the child, and the presence of a parent or [other] caregiver to mediate the intensity of the event."[20]

The court stated that "experts also agreed that how children manifest effects of exposure to domestic violence varies widely."[21] Short-term effects include "posttraumatic stress disorder, sleep disturbances, separation anxiety, more aggressive behavior, passivity or withdrawal, greater distractibility, concentration problems, hypervigilance, and desensitization to other violent events."[22] Other short-term effects are increased risk of depression, anxiety, "and disruptive behavior disorders,

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16. *Id.*

17. *Id.* Subclass B consisted of:

> All children who are or were in the custody of a custodian in subclass A:
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> 1. who have been or are likely to be removed by ACS or other governmental agency since December 16, 2000; or
> 2. who were removed prior to December 16, 2000 and continue to be in removed status after December 16, 2000; or
> 3. who have not been returned to the custodian as soon as possible after December 16, 2000 pursuant to a court order, where;
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> a) ACS has no discretion to delay the child's return; or
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> b) ACS has discretion to delay or condition the child's return, but delay or conditions are not necessary for the protection of the child.

Id. at 184. In order to account for an earlier settlement by an overlapping class, in which the class members waived claims accruing on or before December 16, 2000, subclass B included only children who alleged a constitutional harm that occurred after that date. *Id.* (citing Nicholson v. Williams, 205 F.R.D. 92, 101 (2001)).

18. Nicholson v. Williams, 203 F. Supp. 2d 153, 197–98 (E.D.N.Y. 2002).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

such as conduct problems," difficulty complying with authority, and increased levels of academic difficulty.[23] Expert testimony also indicated that some children have shown no "obvious kinds of outcomes."[24]

Experts disagreed "about the likelihood and seriousness of . . . long-term effects experienced by children who witness domestic violence."[25] One expert "testified that the long-term effects can include a propensity to use violence in future relationships and to hold a pessimistic view of the world."[26] Conflicting expert testimony indicated, however, that children rarely experience long-term effects from witnessing domestic violence. The expert cited studies demonstrating that, among children exposed to the most severe domestic violence, well over eighty percent, and sometimes over ninety percent, tested psychologically normal, were self-confident, had positive images of themselves, and were emotionally well off.[27] Furthermore, while children exposed to the most severe forms of domestic violence are more likely to become violent adults or delinquents, ninety-five to ninety-seven percent of the children in these situations do not become delinquent, do not develop alcohol or drug problems, and about ninety percent do not become violent adults.[28]

Experts also testified about the effects on children of removal from their parents. According to the district court, several experts testified about the "primacy of the parent-child bond."[29] Experts testified that continuity of attachment between parent and child is essential to a child's natural and healthy development.[30] Another expert "testified that disruptions in the parent-child relationship may provoke fear and anxiety in a child and diminish his or her sense of stability and self."[31]

Upon review of this and other evidence, the district court made a number of findings in support of its grant of preliminary injunctive relief. The court found that (1) ACS routinely charged mothers, who had not engaged in violence but had been the victims of domestic violence, with neglect and removed their children from their care; (2) "ACS did so without ensuring that mothers had access to the services they needed, without a court order, and without returning the children promptly after being ordered to do so by the court"; (3) "ACS caseworkers and case managers lacked adequate training about domestic violence, and their practice was to separate mother and child when less harmful alternatives

23. *Id.*
24. *Id.* at 197.
25. *Id.* at 197–98.
26. *Id.* at 198.
27. *Id.*
28. *Id.*
29. *Id.* at 198–99.
30. *Id.* at 199.
31. *Id.*

were available"; (4) "the agency's written policies offered contradictory guidance or no guidance at all on these issues"; and (5) "none of the reform plans submitted by ACS could reasonably have been expected to resolve the problems within the next year."[32] The district court concluded, *inter alia*, "that ACS's practices and policies violated both the substantive due process rights of mothers and children . . . ."[33]

In January 2002, the district court granted the preliminary injunction, stating that "[a] preliminary injunction is granted for the purpose of ensuring that 1) battered mothers who are fit to retain custody of their children do not face prosecution or removal of their children solely because the mothers are battered and 2) the child's right to live with such a mother is protected."[34] The court went on to summarize the preliminary injunction: "the government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer."[35] The preliminary injunction prohibited ACS from carrying out *ex parte* removals "solely because the mother is the victim of domestic violence," or from filing a petition seeking removal on that basis.[36] The injunction also imposed a variety of procedural, consultation, training, and reporting requirements, such as a requirement that ACS inform mothers and children of their rights, include domestic violence specialists in its consulting teams, and report monthly to the district court on its progress.[37]

On appeal, the Second Circuit held that "[t]he District Court did not abuse its discretion in finding that ACS's practice of effecting removals based on a parent's failure to prevent his or her child from witnessing domestic violence against the parent amounted to a policy or custom of ACS."[38] The court concluded that, in some instances, removals based on children witnessing domestic violence raised procedural and substantive due process and Fourth Amendment questions (the court distinguished between *ex parte* and court-ordered removals) but refrained from deciding these questions in order for the New York Court of Appeals to resolve underlying questions of Family Court Act interpretation, which would obviate the need to determine the constitutional issues.[39] The

32. Nicholson v. Scoppetta, 820 N.E. 2d 840, 843 (N.Y. 2004) (citing *Nicholson*, 203 F. Supp. 2d at 228–29).

33. *In re* Nicholson, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002).

34. *Id.*

35. *Id.* at 188.

36. *Id.* ¶¶ 3, 6 at 190–91.

37. *Id.* at 190, 192–93.

38. Nicholson v. Scoppetta, 344 F.3d 154, 165 (2d Cir. 2003).

39. *Id.* at 171–76. Regarding the due process allegations, the Second Circuit refrained from deciding whether *ex parte* removals resulted in a procedural due process violation, but noted that such

Second Circuit held that the Family Court Act was "fairly susceptible to an interpretation by the New York Court of Appeals that would avoid or significantly alter the substantial constitutional questions presented in this appeal"[40] and, accordingly, certified several questions of statutory interpretation to the New York Court of Appeals.[41]

The New York Court of Appeals clarified that a child's witnessing of domestic violence against his or her caretaker is insufficient to constitute "neglect" under New York law.[42] The court further stated that "exposure of a child to violence is not presumptively ground for removal, and in many instances removal may do more harm to the child than good."[43] The court also concluded that "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child."[44]

Subsequently, the Second Circuit remanded the action to the district court for reconsideration in light of the decision of the New York Court of Appeals.[45] The parties then settled the action, with the district court approving a settlement that would release ACS from the two-year

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removals did not infringe substantive due process rights because the removals were temporary. *Id.* at 172. The court further refrained from determining whether court-ordered removals posed substantive or procedural due process problems. *Id.* at 173–75.

40. Nicholson v. Scoppetta, 116 F. App'x 313, 315 (2d Cir. 2004).

41. *Id.* These certified questions were as follows:

> (1) Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?; (2) Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute a "danger" or "risk" to the child's "life or health," as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026–1028?; and (3) Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary," N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that "removal was in the child's best interests," N.Y. Family Ct. Act §§ 1028, 1052(b) (i) (A), or must the child protective agency offer additional, particularized evidence to justify removal?

Nicholson, 344 F.3d at 176–77.

42. Nicholson v. Scoppetta, 820 N.E. 2d 840, 845 (N.Y. 2004).

> Conceivably, neglect might be found where a record establishes that, for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children; . . . or where the children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence. In such circumstances, the battered mother is charged with neglect not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.

Id. (citations omitted).

43. *Id.* at 849.

44. *Id.* at 854.

45. *Nicholson*, 116 F. App'x at 316.

preliminary injunction, in light of ACS's compliance with the terms of the preliminary injunction and its intention to comply with the Court of Appeals' decision.[46]

II. *NICHOLSON*'S FAMILY PRIVACY

Although the case was ultimately decided on state law grounds, the district court's preliminary injunction decision[47] is instructive and important because it applies privacy conceptions in an area of law largely based on the dismantling of the public-private divide. The *Nicholson* district court based its substantive due process analysis on the fundamental right to "family privacy."[48] At the core of this "family privacy" is the parental relationship between mother and child, although the court invokes precedent establishing rights for parents in general.[49] The court's explicit reliance on "family privacy" demarcates the spheres in which legal regulation is appropriate. The court strongly emphasized that the family—comprised of parents and children—occupies a space in the private sphere, meant to be shielded from prying state intrusion.

The district court situated the "mothers' and their children's liberty interests in familial integrity, and the mothers' rights to direct the upbringing of their children" in the broad context of liberty interests pertaining to "marriage, family life, and the upbringing of children."[50] Specifically, the court noted that "[t]he Supreme Court has deemed a person's right to conceive and raise children to be one of the 'basic civil rights of man.'"[51] Apart from noting the foundational nature of the right to bear and raise children, the court drew a clear line around family life: "[it is] 'beyond peradventure' that the 'existence of a private realm of family life which the state cannot enter has its source not in state law, but in . . . intrinsic human rights.'"[52]

The court invoked several examples supporting the idea of the constitutional "right . . . families retain against state interference":[53] protected decisions involving the formation of a family (including marriage and procreation), the protected interest in controlling and raising children without state interference, and family members' interest in being together.[54] The decision articulated a clear divide between

46. Stipulation and Order of Settlement, Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2004) (No. 00-CV-2229).

47. *In re* Nicholson, 181 F. Supp. 2d 182 (E.D.N.Y. 2002).

48. *Nicholson*, 203 F. Supp. 2d at 153.

49. Throughout this Article, except as noted in Part IV, the terms "parent" and "mother" are used interchangeably, as the district court did in *Nicholson*.

50. *Nicholson*, 203 F. Supp. 2d at 233.

51. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 652 (1972)).

52. *Id.* at 234 (quoting Duchesne v. Sugarman, 566 F.2d 817, 824 (2d Cir. 1977)).

53. *Id.*

54. *Id.* at 234–35.

"familial privacy" and "state interference," quoting the Second Circuit's 1977 decision in *Duchesne v. Sugarman* for the proposition that the "'right of the family to remain together without the coercive interference of the awesome power of the state' is 'the most essential and basic aspect of familial privacy.'"[55] Terminations of the parent-child relationship, however brief, and forced separations of parent and child encroach on the protection constitutionally afforded this private sphere.[56]

The court stated that the "biological relationship between mother and child" produces family privacy rights but noted significantly that "this relationship is not the sole predicate for such rights."[57] The court proceeded to include other "familial relationships" that have also received "constitutional recognition," including relationships between children and uncles, aunts, cousins, and grandparents.[58] The court also made clear that the "mothers" to whom it referred are not solely female parents of the class plaintiff children. The class of mothers also includes, in rare instances, male custodial parents who have been abused.[59]

Although the court noted that the precise standard in the Second Circuit for evaluating a substantive due process claim for liability against a state officer for a past act is not clear,[60] it indicated that applying strict scrutiny in the case of "forced separation of a child from an abused mother" is appropriate because courts have conferred more importance to "familial rights" protected under the Due Process Clause than to property rights.[61]

There are, however, "wide limits" on the family's immunity from state intrusion.[62] The court noted that "[e]ven as it has recognized the sanctity of familial rights, the Court has always acknowledged the

55. *Id.* at 235 (quoting *Duchesne*, 566 F.2d at 825).

56. *Id.* at 235–36.

57. *Id.* at 235.

58. *Id.*

59. *Id.* at 164.

60. *Id.* at 242 (describing three-part formulation in *Joyner v. Dumpson*, 712 F.2d 770, 777 (2d Cir. 1983) for substantive due process analysis, which differs from the approach enunciated by the U.S. Supreme Court's approach, as enunciated in *Washington v. Glucksberg*, 521 U.S. 702 (1997)). The test in *Joyner* for evaluating substantive due process claims in the legislative context, which the district court deemed applicable to ACS's general policy, requires analysis of (1) whether a "fundamental right" protected under the Due Process Clause of the Fourteenth Amendment exists; (2) whether the defendants have "significantly infringed" that fundamental right; and (3) whether an "important state interest" justifies the infringement." *Id.* at 243 (citing *Joyner*, 712 F.2d at 777). The district court contrasts this formulation with the U.S. Supreme Court's approach to substantive due process in *Washington v. Glucksberg*, in which the Court declared that "the Fourteenth Amendment forbids the government to infringe . . . [on] fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 243 (quoting *Glucksberg*, 521 U.S. at 721).

61. *Id.* at 244.

62. *Id.* at 164.

necessity of allowing the states some leeway to interfere sometimes."[63] The court suggested that precedent in the area of substantive due process familial rights may be interpreted as not applying strict scrutiny automatically to regulation of familial rights because such scrutiny would interfere with child protection interests, but rather as applying strict scrutiny when the "centrality of the mother-child relationship—custody—is being challenged."[64] The court noted, however, that regardless of the standard applied, "when potentially unconstitutional policies of a government entity impinge on a fundamental private right such as family integrity, courts have a duty to review alleged infringements closely."[65]

Accordingly, in analyzing whether the encroachment on the fundamental right at stake was justified, the court found that unnecessary removals "work[ed] against the state interest in protecting children," based on expert testimony concerning the relative absence of "imminent danger" to children from witnessing domestic violence compared to the harm of removal.[66] The court therefore held that ACS's policies and practices substantially infringed mothers' fundamental liberty interests in family privacy and violated their procedural and substantive due process rights under the Fourteenth Amendment.[67]

III. THE DOMESTIC VIOLENCE MOVEMENT AND CRITIQUES OF THE PUBLIC-PRIVATE DICHOTOMY

The *Nicholson* court's focus on family privacy to guard the mother-child relationship implicates ongoing critical discourse, including within feminist scholarship, concerning the validity of the traditional public-private dichotomy. Specifically, it implicates feminist critiques of traditional uses of privacy norms and the "public-private" dichotomy and feminism's ensuing justifications for legal intervention into domestic violence. This Part briefly sets forth the contours of the feminist critique of the public-private dichotomy and discusses how "deconstruction" of this divide has been central to legal intervention into domestic violence. This Part also explicates differing feminist views of the theoretical consequences of skepticism toward the public-private distinction. Radical feminism has rejected privacy as a basis for asserting women's rights, based on the gendered nature of the public-private dichotomy. In

63. *Id.* at 245.

64. *Id.*

65. *Id.* at 246.

66. *Id.* at 250. "This adverse effect has been recognized by child welfare advocates and domestic violence experts, and informs the best practices in the field of child protection .... ACS policies and practice result in routine removals that are unnecessary and ignore alternatives that would be far better for the children involved." *Id.* at 251 (citation omitted).

67. *Id.*

contrast, liberal feminism has defended privacy, arguing that it is possible to disentangle privacy from its history of gender subordination.

A. THE PUBLIC-PRIVATE DICHOTOMY

The view that society is divided into separate spheres of the public and the private is pervasive and has been well examined.[68] Political and legal theorists have both supported and critiqued the notion that society consists of a "private" sphere, which is domestic in nature and consists of intimate, familial, and sexual relationships,[69] and a "public" sphere, which is the domain of politics and power.[70] Underlying this dichotomy is the assumption that relationships within the "private" sphere are voluntary and that power has no role in these interactions.[71] Early liberal theorists identified a "zone of privacy as a way of delimiting the power of the state" and protecting individuals "against the arbitrary exercise of power."[72] Liberal theory came to view the public as a "socially constructed realm of domination" and a site for the exercise of political freedom, whereas the private was an "unconstructed realm of 'natural' freedom, free from relations of power and domination."[73]

These spheres correlate with views of the propriety of legal intervention. Generally speaking, the public sphere—that of politics and commerce[74]—was properly subject to legal regulation, while the private

68. Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 237 (1987) (addressing the pervasive and entrenched nature of the split between public and private in American culture).

69. Martha A. Ackelsberg & Mary Lynson Shanley, *Privacy, Publicity, and Power: A Feminist Rethinking of the Public-Private Distinction, in* FEMINIST THEORY AND POLITICS 216 (Virginia Held & Alison Jaggar eds., 1996).

70. *Id.*

71. *Id.* at 215. Ackelsberg and Shanley trace the appearance of various forms of the public-private dichotomy through western political thinking. *Id.* at 214. Aristotle's "public-political" arena was where free and equal citizens engaged in striving together toward common good, whereas the private domain included "relationships of inequality, dependence, and concern for meeting necessities of life." *Id.* at 214. Early liberal theorists Hobbes and Locke defined a "zone of privacy" as a "way of delimiting the power of the state . . . and protecting individuals against arbitrary exercise of power." *Id.*

72. *Id.* at 214 (discussing Hobbes and Locke).

73. *Id.* In the private sphere, "we assume we operate within a protected sphere of autonomy, free to make self-willed individual choices and to feel secure against the encroachment of others." Freeman & Mensch, *supra* note 68, at 237. On the other hand, "the public realm is a world of government institutions, obliged to serve the public interest rather than private aims." *Id.*

74. As discussed elsewhere, legal regulation of the market has not been uncontroversial. Frances Olsen discusses how the laissez-faire view of economic relations has paralleled the historical principle of non-intervention into the "private" family. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 (1983). In this Article, I focus on the traditional dichotomy between public and domestic life, and limit the latter to that which relates to family, marriage, and interpersonal relationships. According to Ackelsberg and Shanley, in the late nineteenth century, the development of industrial capitalism (and Marx's critique of relationships under capitalism) led many to expand the notion of the public to include economic activity. Ackelsberg & Shanley, *supra* note 69, at 215–16.

sphere—that of domestic life, family, and marriage—was a "free" zone deemed immune from legal intervention. This dichotomy gained particular significance during the rise of industrial capitalism. According to historian Linda Gordon, "[f]amily 'autonomy' was an oppositional concept in the nineteenth century, expressing a liberal ideal of home as a private and caring space in contrast to the public realm of increasingly instrumental relations. This symbolic cluster surrounding the family contained both critical and legitimating responses to industrial capitalist society."[75] The domestic sphere provided "a haven from the stress and anxieties of modern life."[76]

The public-private dichotomy has historically been gendered, with the "public" sphere traditionally being the realm of men and the "private" sphere the realm of women.[77] "Privacy"—freedom from the intrusions of politics, business, and law—cloaked a domestic sphere revolving around marriage and family. The "private" sphere was one to which women were confined and over which they appeared to preside.[78] Within this domestic sphere, women dispensed "affection and spiritual nurturance" to their family based on the assumption of their natural suitability for such interaction.[79] Accordingly, gender and norms of motherhood have played a pronounced role in the public-private dichotomy.

B. Legal Realist and Critical Legal Studies Perspectives on the Public-Private Dichotomy

Feminist critiques of the public-private dichotomy have built upon the examinations by legal realism and its progeny of the power dynamics inherent in the exercise of "private" rights.[80] The legal realist critique challenged the assumption that free will governed interactions within the zone of privacy by arguing that political power coerces individuals in the private domain.[81] For example, the exercise of "private" property and contract rights is not "free," insofar as these rights are created by and dependent upon the state and are created by and subject to power.[82] In

75. Linda Gordon, *Family Violence, Feminism, and Social Control, in* Women, the State, and Welfare 191 (Linda Gordon ed., 1990).

76. Olsen, *supra* note 74, at 1499.

77. *Id.* at 1499–1501.

78. *Id.*

79. *Id.*

80. *See* Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 Chi.-Kent L. Rev. 847, 857–58 (2000) (connecting feminist critique to legal realism); Freeman & Mensch, *supra* note 68, at 247 (discussing legal realism's challenge to the coherence of the public-private trope); Susan Moller Okin, Justice, Gender, and the Family 117 (1989) (discussing legal realism's and critical legal studies' concern with power differentials).

81. Freeman & Mensch, *supra* note 68, at 246 (summarizing legal realist position).

82. *See id.* at 247–48; Higgins, *supra* note 80, at 858 ("According to the familiar realist critique, the exercise of private rights involves the exercise of power, not always (and certainly not exclusively)

this sense, they are coerced, rather than voluntary.[83] Legal realists have been credited with exposing the incoherence of the line between the public and the private spheres. As Alan Freeman and Elizabeth Mensch write, "[t]he realist scholars, part of the general twentieth-century revolt against formalism and conceptualism, convincingly undermined all faith in the objective existence of rights by challenging the coherence of the key legal categories that gave content to the notion of bounded public and private spheres."[84] Critical legal studies scholars focused similarly on the realities of power distribution undermining expectations of formal equality.[85] This critical focus further challenged the seemingly objective nature of the public-private distinction.

C. Feminist Critique of the Public-Private Dichotomy and the Basis for Domestic Violence Intervention

Following in the legal realist and critical legal studies tradition, feminists have "deconstructed" the public-private dichotomy, arguing that it is gendered in both its construction and its effects. This section explicates the feminist critique of the public-private dichotomy, provides some historical context for the critique of privacy's oppressive effect on women, and explains the significance of the public-private critique to the domestic violence movement.

1. *Feminist Critique of the Public-Private Dichotomy*

> The dichotomy between the private and the public . . . is, ultimately, what the feminist movement is about.[86]

The district court's reliance in *Nicholson* on family privacy occurs against the backdrop of feminist critiques of the traditional dichotomy of public and private spheres as it relates to the propriety of legal intervention into the home. As discussed above, this traditional notion of "separate spheres" is based on the division of society into the "public world of [the] marketplace" and the "private world of family and domestic life."[87] Feminist scholars have generally rejected the notion of a

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the exercise of free choice. Focusing on unequal economic power, realists argued, for example, that contractual relations were better understood as coercive rather than voluntary." (citing as representative examples of the legal realist critique Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 3–18, 393 (1960); L. L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429, 435–38 (1934); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935))).

83. Higgins, *supra* note 80, at 857–58.

84. Freeman & Mensch, *supra* note 68, at 247.

85. Okin, *supra* note 80, at 117 ("[C]ritical legal studies—like its ancestor, legal realism—is concerned with the *actual* inequalities and power differentials that do so much to cancel out the formal equalities of the law.").

86. Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* Public and Private in Social Life 281, 281 (S. I. Benn & G. F. Gaus eds., 1983).

87. Elizabeth M. Schneider, Battered Women & Feminist Lawmaking 87–88 (2000); *see also* Olsen, *supra* note 74, at 1499–1501.

"sharp demarcation between public and private"[88] and the assumption that the state should not interfere in the private sphere.[89] The adage that "[t]he personal is political" has been used as shorthand for feminist challenges to the underlying gendered assumptions and manifestations of the public-private dichotomy, which have been critical to the contemporary feminist enterprise.[90]

Feminism has disputed the assumption that domestic and personal life are immune from the "dynamic of *power*, which has typically been seen as the distinguishing feature of the political."[91] Feminist political theorist Susan Moller Okin has argued that power within the family has not been recognized as such because the family has been "regarded as natural or because it is assumed that, in the family, altruism and the harmony of interests make power an insignificant factor."[92] Domestic violence has been viewed as a literal example of power's influence in family life.[93] Feminists have pointed to the ways in which privacy has reinforced the power of powerful members of families—i.e., husbands and fathers—over less powerful women and children, by ratifying "openly hierarchical" social roles within the family in the guise of nonintervention and freedom.[94]

Moreover, feminism has challenged the notion of state neutrality in its interactions (or noninteractions) with the private sphere and family.[95] In her seminal evaluation of the public-private dichotomy, Frances Olsen critiques the public-private paradigm's assumption that the state has no responsibility for inequality in the private sphere—that the state is capable of leaving the family "free" through "neutral" nonintervention.[96] She argues that this is impossible because the state lays the "legal ground rules" for interactions within that sphere, which affects the "social power of individuals and thus human interaction."[97] In support of her argument, Olsen points to examples like assault law, self-defense law, property division upon dissolution of marriage, and parenthood.[98]

The state's role in laying ground rules and ratifying existing social

88. SCHNEIDER, *supra* note 87, at 88 (citing Linda Kerber, *Separate Spheres, Female Worlds, Women's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 17 (1988); Freeman & Mensch, *supra* note 68; Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, *in* CONFLICTS IN FEMINISM 156–60 (Marianne Hirsch & Evelyn Fox Heller eds., 1990); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982)).

89. OKIN, *supra* note 80, at 127.

90. *Id.* at 124, 127.

91. *Id.* at 128.

92. *Id.*

93. *Id.*

94. Olsen, *supra* note 74, at 1504, 1509; *see also* OKIN, *supra* note 80, at 129.

95. *See* Olsen, *supra* note 74, at 1509.

96. *Id.* at 1506, 1509.

97. *Id.* at 1509–10 n.53.

98. *Id.*

roles suggests the private sphere's dependence on and subordination to the public sphere.[99] Some feminists have questioned whether the family is capable of existing apart from the state because, they argue, family and marriage are "creation[s] of the state."[100] Elizabeth Schneider has argued that "no realm of personal and family life exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere; 'private' and 'public' exist on a continuum."[101]

Feminist theorists have also focused on the gendered assumptions inherent in determining what is public (and subject to legal regulation) and what is private and immune from law.[102] According to Schneider, the very designations of public and private are gendered, insofar as they are "based on social and cultural assumptions of what is valued and important."[103]

2. A Historical Perspective on Privacy and Violence

The notion of domestic privacy that has traditionally shielded domestic violence from legal intervention derives from the historical shift from "hierarchy-based" views of marriage to "companionate" ones.[104] Reva Siegel has discussed the abolition of marital chastisement in the late nineteenth century, which gave rise to a "discourse of affective privacy" surrounding marriage during the industrial era.[105] Through this transformation, judges "progressively abandoned tropes of hierarchy and began to employ tropes of interiority to describe the marriage relationship, justifying the new regime of common law immunity rules in languages that invoked the feelings and spaces of domesticity."[106] The rhetoric of privacy persisted generally undisturbed until the late 1970s, when "the feminist movement began to challenge the concept of family privacy that shielded wife abuse."[107]

The chastisement doctrine, by which husbands possessed the legal power to require wives' obedience through physical punishment,

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99. *See* OKIN, *supra* note 80, at 129.

100. Olsen, *supra* note 74, at 1504; *see also* OKIN, *supra* note 80, at 129 ("[T]o the extent that a more private, domestic sphere does exist, its very existence, the limits that define it, and the types of behavior that are acceptable and not acceptable within it all result from political decisions.").

101. SCHNEIDER, *supra* note 87, at 88.

102. *Id.* at 89 (citing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Rhonda Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change*, *in* A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 303 (Jules Lobel ed., 1988); Minow, *supra* note 88).

103. *Id.* at 90.

104. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996).

105. *Id.*

106. *Id.*

107. *Id.* at 2118.

formally ceased during the antebellum era.[108] Prior to that time, the doctrine of marital unity prevailed, giving the husband superiority over his wife in most aspects of the relationship, merging the wife's legal identity into her husband's, and empowering the husband to command his wife's obedience.[109] During the antebellum era, the family transformed into a "site of specialized domestic activities, presided over by a mother figure who dispensed affection and spiritual nurturance to husband and children alike."[110] This transformation, as well as criticism of corporal punishment, drew the chastisement prerogative into question.[111]

Courts had formally repudiated chastisement by the 1870s, yet, according to Siegel, jurists and lawmakers routinely condoned marital violence.[112] Marital privacy emerged as the primary justification for not regulating wife abuse, thus preserving the chastisement prerogative in a new form.[113] Privacy justified criminal and tort immunity for wife beating in the nineteenth century.[114] And although wife beating was regarded as a crime by the second half of the nineteenth century, courts rejected wives' tort claims based on domestic violence. Spousal immunity for intentional torts persists in some form in several states as recently as 1996.[115]

3. *The Domestic Violence Movement: Instilling "Dimensions of a Public Issue"*

The "rhetoric of privacy" has been described as the "most important ideological obstacle to legal change and reform" regarding male abuse of women.[116] The battered women's movement has aimed to recast male battering of women as more than a "purely private problem" and instill it with "the dimensions of a public issue."[117] Thus, feminists have sought to reconstitute domestic violence as a public issue while questioning the legitimacy of the traditional public-private divide.[118] They have

108. *See id.* at 2123–29.

109. *Id.* at 2122–23.

110. *Id.* at 2126.

111. *Id.* at 2125–26.

112. *Id.* at 2129–30.

113. *Id.* at 2151, 2153.

114. *Id.* at 2154–57, 2161–62. Siegel cites a number of nineteenth-century decisions regarding criminal liability for wife abuse. *Id.* In particular, she quotes *State v. Oliver*, 70 N.C. 60, 61–62 (1874), in which the court held that criminal liability did not attach: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." *Id.* at 2158. She also cites *Drake v. Drake*, 177 N.W. 624, 625 (Minn. 1920), for its rejection of intentional tort liability to maintain the "welfare of the home, the abiding place of domestic love and affection, . . . in all its sacredness, undisturbed by a public exposure of trivial family disagreements . . . ." *Id.* at 2166.

115. Siegel, *supra* note 104, at 2163 n.163.

116. SCHNEIDER, *supra* note 87, at 87.

117. *Id.* Schneider offers examples such as "legal reform and social service efforts—[i.e.,] the development of battered women's shelters and hotlines, and new legal remedies developed for battered women—[all] premised on the idea of battering as a public harm." *Id.*

118. *See* Nancy Fraser, *Struggle Over Needs: Outline of a Socialist-Feminist Critical Theory of Late-*

accordingly identified domestic violence as a "systemic, political problem," thereby "transcend[ing] the 'conventional separation of spheres.'"[119]

Domestic violence has begun to garner more attention in the public sphere, as demonstrated, in part, by judicial decisions holding police officers liable for money damages for failure to intervene to protect domestic violence victims and by increased state legal remedies.[120] But Elizabeth Schneider questions whether such developments are likely to provide real protection to victims.[121] Moreover, Siegel contends that the discourse of privacy persists despite contemporary feminists' efforts to "pierce the veil of privacy talk" surrounding domestic violence.[122] In addition to the continuing force of interspousal tort immunity in some states, privacy rhetoric has emerged in equal protection challenges to discriminatory police practices involving domestic violence victims and in the federalism critique of the civil rights remedy provided by the Violence Against Women Act ("VAWA").[123] In particular, Siegel links the federalism critique of VAWA's civil rights remedy to the view of sexual assault as a "family" or localized matter.[124]

Privacy concepts in the domestic violence context are particularly problematic because they "permit, encourage, and reinforce violence against women."[125] This occurs because "'[p]rivacy' is selectively invoked as a rationale for immunity in order to protect male domination."[126] Schneider offers examples of this dynamic, including police failures to respond to battered women's calls for assistance, civil courts' refusals to evict domestic violence victims' assailants, and criminal prosecution of pregnant battered women for drinking liquor instead of prosecution of their batterers.[127] Such failures to respond, predicated on privacy, constitute an "affirmative political decision that has serious public consequences."[128] Accordingly, feminist legal scholars and domestic violence advocates argue that privacy discourse participates in "supporting, encouraging, and legitimizing violence against women and other battered partners or family members."[129] It does so by rendering

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Capitalist Political Culture, *in* WOMEN, THE STATE, AND WELFARE 199, 213–14 (Linda Gordon ed., 1990); SCHNEIDER, *supra* note 87, at 88.

119. SCHNEIDER, *supra* note 87, at 96 (citing Fraser, *supra* note 118, at 213–14).

120. *Id.* at 92.

121. *Id.*

122. Siegel, *supra* note 104, at 2173–74.

123. *Id.* at 2191–94 (citing Siddle v. City of Cambridge, 761 F. Supp. 503, 512 (S.D. Ohio 1991) (noting that "the criminal [arena] may not be the best place to resolve marital problems of this sort")).

124. *Id.* at 2201; *see also* United States v. Morrison, 529 U.S. 598, 599 (2000).

125. SCHNEIDER, *supra* note 87, at 87.

126. *Id.* at 88.

127. *Id.* at 88–89.

128. *Id.* at 92.

129. *Id.*

abuse nonsystemic and intimate.[130]

D. The Radical Feminist Rejection of Privacy as a Basis for Rights

The radical feminist critique of privacy takes the feminist critique of the public-private dichotomy a step further and rejects privacy as a basis for establishing rights, arguing that privacy cannot escape its coercive pedigree and fundamentally gender-subordinating manner of operation. By way of illustration, I focus on Catharine MacKinnon's radical feminist perspective.[131]

MacKinnon argues that while the categorization of public and private spheres purports to confer freedom from public intrusion in the "private" sphere, this sphere is conceptually and materially an unregulated space for those who abuse women and children.[132] In discussing *Deshaney v. Winnebago County Department of Social Services*, in which the Supreme Court held that state child protection officials were not, absent discrimination, legally responsible for a child who was permanently injured from abuse at home of which the officials were aware, MacKinnon contends that the "private" sphere falsely rests on the view that "[t]he world without state intervention, the world of state inaction, the private world of [Joshua Deshaney's] abuse . . . is the 'free world.'"[133]

The dichotomy between public and private masks the law's role in actually constructing these categories and falsely assumes "freedom" and "consent" in the private sphere.[134] Thus, as MacKinnon argues, the *Deshaney* court declared that "no act of the state contributes to shaping its internal alignments or distributing its internal forces, so no act of the state should participate in changing it."[135] The state's restraint in acting in the private sphere, "framed as an individual right, presupposes that the private is not already an arm of the state."[136] MacKinnon emphasizes that "in this scheme, intimacy is implicitly thought to guarantee symmetry of power."[137] Within the so-called "free" private zone, the only injuries assumed to arise occur due to the state's wrongful encroachment on that private sphere, "not within and by and because of it."[138]

MacKinnon also explores the notion of consent in the public-private

130. *Id.* at 91.

131. *See* MacKinnon, *supra* note 102, at 187–94.

132. *Id.*

133. *Id.* at 187 (citing Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (finding no due process liberty interest created by state child protection statutes and enforcement in case of permanent injury to abused child of which agency was aware)).

134. *Id.* at 190.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

regime. She argues that "in private, consent tends to be presumed."[139] The coercive force in the home, where privacy doctrine is most salient, is not perceived as such.[140] She points to the "epistemic problem" of "getting anything private to be perceived as coercive."[141] This foreshadows, she writes, the questions about why someone would "allow" abuse in private or why a battered woman does not leave.[142] This question is "given its insult by the social meaning of the private as a sphere of choice."[143] The view of the private as a sphere of choice enables privacy law to protect the "existing distribution of power and resources within the private sphere . . . ."[144] This occurs because the "law of privacy" has translated "liberal values into individual rights as a means of subordinating those rights to specific social imperatives."[145]

MacKinnon frames the public-private divide set up by liberalism as a feminist problem. She argues that "[f]or women the measure of intimacy has been the measure of the oppression."[146] "[F]eminism has had to explode the private."[147] She explains further that "feminism has seen the personal as political."[148] She collapses the distinction between public and private, arguing that "for women there is no private, either normatively or empirically."[149] Privacy doctrine ensures that women essentially "have no privacy to lose or to guarantee."[150] The problem for women is the inherent gender-based backdrop against which privacy operates and simultaneously helps create. MacKinnon describes privacy in "sword/shield" terms—it is "a sword in men's hands" and "presented as a shield in women's."[151] Lack of public intervention is coercive because of "socially pervasive and enforced" inequality.[152] Privacy (or freedom from public intervention) "protects abstract autonomy, without inquiring into whose freedom of action is being sanctioned, at whose expense."[153]

Accordingly, MacKinnon argues that the right of privacy is essentially "a right of men 'to be let alone' to oppress women one at a time":[154]

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139. *Id.*
140. *Id.* at 190–91.
141. *Id.*
142. *Id.* at 191.
143. *Id.*
144. *Id.* at 193.
145. *Id.* at 187.
146. *Id.* at 191.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 194.
154. *Id.*

> Privacy law assumes women are equal to men in there. Through this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition.[155]

In this sense, the public-private distinction is not gender-neutral but is instead decidedly gender-specific in that it both creates gender subordination and operates in its midst. MacKinnon also argues that privacy doctrine "embodies and reflects the private sphere's existing definition of womanhood"—one that involves separation from one another, isolation, and subordination.[156] The problem with privacy is that it obscures women's shared experience and "mystifies the unity among the spheres of women's violation. It polices the division between public and private, an at once epistemic and material division that keeps the private . . . beyond public redress, and depoliticizes women's subjection within it."[157]

MacKinnon applies her radical critique of privacy to the abortion context, objecting to the privacy-based justification for abortion rights because the notion of non-intervention—in the guise of privacy—coerces women. The assumption that law is not acting when it leaves women "free" to make a private decision, as in *Roe v. Wade*, justifies state refusal to require Medicaid programs to cover medically necessary abortions in *Harris v. McRae* on the ground that the state need not remove obstacles "not of its own creation."[158]

MacKinnon's analysis provides context for discussions of marital violence and child abuse by unraveling the notion of privacy cloaking the domestic sphere. She argues against framing abortion rights in privacy terms because privacy doctrine has historically shielded domestic abuse. The law's historical reluctance to interfere with such actions in the home assumes freedom of choice in the home and ignores coercion in that sphere. Accordingly, the reliance on privacy both fosters and relies upon freighted conceptions of societal spheres that are, in MacKinnon's radical feminist view, conceptually and materially gendered.

E. Liberal Feminist Support of Privacy as a Basis for Rights

In contrast to radical feminists like Catharine MacKinnon, who view privacy as a tool of gender subordination, other feminist scholars have expressed reservations about abandoning the value of privacy altogether and have promoted privacy's virtues for women. These scholars have

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 187 (citing Roe v. Wade, 410 U.S. 113, 153 (1973); Harris v. McRae, 448 U.S. 297 (1980)).

argued that deconstructing the public-private distinction as historically comprised does not and should not translate into a wholesale rejection of the notion of privacy or of the value of acknowledging differences between public and private life.[159] Generally, scholars have argued that the recognition that the public-private dichotomy may be incoherent, socially constructed, and historically harmful to women does not render the paradigm wholly without merit. To borrow from Anita Allen, the radical rejection of privacy, like that proposed by MacKinnon "tosses out the baby with the bath water."[160] This critique generally proposes rejecting the harmful, formerly coercive forms of privacy while recognizing its beneficial uses.

Feminist defenses of privacy fall into three general categories: (1) why privacy is valuable generally; (2) the harms that ensue from lack of privacy in certain contexts; and (3) why privacy is particularly valuable for women.

At the risk of oversimplifying, the first category—why privacy is valuable generally—arises from our conceptions of what kind of society we want and how we view our relationship with the state. Liberal feminist scholars and those who have critiqued the public-private distinction and its traditional, gender-subordinating uses have frequently been clear that they do not suggest that privacy has no value in our society. Their disclaimers suggest a normative argument for preserving the public-private distinction, for to reject privacy entirely as a concept would seem to open the door to an unsavory, authoritarian swallowing of the individual by the state.[161] Frances Olsen is clear that she does not advocate replacing the market/family dichotomy with "an all-powerful state and all-embracing market."[162] Okin similarly argues for the value of privacy vis-à-vis the state: "Both the concept of privacy and the existence of a personal sphere of life in which the state's authority is very limited are essential."[163]

Anita Allen and others who defend the value of privacy differ from the radical position MacKinnon advances by arguing that, despite its historical roots in gender subordination, the public-private dichotomy is valid based on normative, descriptive, and instrumental grounds.[164] Allen

159. *See, e.g.*, OKIN, *supra* note 80, at 127–28; Anita L. Allen, *Privacy at Home: The Twofold Problem*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 193, 203 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); Higgins, *supra* note 80, at 857–58; Frank Michelman, *Private Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1785 (1990).

160. Allen, *supra* note 159, at 203.

161. *See, e.g.*, OKIN, *supra* note 80, at 127–28; Michelman, *supra* note 159, at 1785; Higgins, *supra* note 80, at 847.

162. Olsen, *supra* note 74, at 1568.

163. OKIN, *supra* note 80, at 128.

164. *See, e.g.*, OKIN, *supra* note 80, at 127–28; Allen, *supra* note 159, at 194; Higgins, *supra* note 80,

contends that criticism of the historically poor quality of life women have experienced within the private sphere does not justify "a rejection of the concept of a separate, private sphere."[165] She pursues an instrumental approach to the dichotomy—remaining agnostic about whether any distinctions can actually be drawn between the public and private spheres—emphasizing instead the importance of a sense of "personal privacy and private choice" to "moral personhood."[166]

Okin argues that the feminist adage that "the personal is political" is not intended literally, that there are meaningful distinctions between the public and the private spheres of society.[167] "Challenging the dichotomy does not necessarily mean denying the usefulness of a concept of privacy or the value of privacy itself in human life."[168] Okin has carefully maintained that she does not advocate the complete collapse of the dichotomy or "a simple or a total *identification* of the personal and the political."[169] By disclaiming complete identification of the personal with the political, Okin assumes that privacy is itself a valuable concept because it bolsters individualism.

Tracy Higgins has similarly argued that feminism's critique of coercive uses of privacy rhetoric and the public-private distinction does not obviate the descriptive, theoretical, and instrumental value of these categories.[170] For example, Higgins argues that the public-private distinction may actually capture descriptive differences that are helpful to understanding women's experiences. She points to the international human rights context, arguing that state-sponsored violence may qualitatively differ from private violence insofar as the harms resulting from the former are compounded by "political powerlessness and vulnerability that often extend beyond the individual to the broader community."[171] Higgins also argues that the public-private distinction is theoretically meaningful insofar as the feminist critique of the paradigm implies a difference between these categories.[172] Collapsing the difference between the public and private does little to advance the feminist argument for greater public regulation of harmful private action.[173] Last, Higgins contends that the public-private distinction can be instrumentally

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at 857–58; Michelman, *supra* note 159, at 1785.

165. Allen, *supra* note 159, at 208.

166. *Id.*

167. OKIN, *supra* note 80, at 127.

168. *Id.*

169. *Id.* at 127–28.

170. *See* Higgins, *supra* note 80, at 861–66; *see also* Michelman, *supra* note 159, at 1785 (arguing that the message that "personal is political" does not necessarily mean disposing of the private-public dichotomy and that there is satisfaction from using the distinction between "personal" and "political").

171. Higgins, *supra* note 80 at 862.

172. *Id.* at 863.

173. *Id.* at 863–64.

useful to women because women may use public, democratic means to balance the private power exercised by others.[174]

Feminist defenders of privacy and the public-private distinction have also deconstructed the standard feminist deconstruction of privacy to illustrate the harms that ensue from lack of privacy in certain contexts. Legal scholars and historians have argued that the notion of privacy is class- and race-salient insofar as white, wealthier individuals have historically enjoyed its benefits and may *choose* to cast off its chains more readily then their nonwhite, lower-class counterparts. In writing about the history of child protection in the nineteenth century, Linda Gordon has argued that "[p]oor women had less privacy and therefore less impunity in their deviance from the new child-raising norms."[175] Poor urban mothers were vulnerable to criticism of their mothering—"already made more problematic by urban wage labor living conditions"—and threats that their children would be taken away.[176] Allen has similarly discussed the class-salience of privacy, describing it as "a virtual commodity purchased by the middle class and the well-to-do."[177] She illustrates her point with the example of welfare caseworkers and housing authorities who inspect the homes of the poor with little regard for their privacy or autonomy.[178] Martha Ackelsberg and Mary Lynson Shanley have discussed privacy's race-salient dimension as apparent in the slavery context.[179] On a fundamental level, they argue, "to be chattel . . . means to have no private life."[180]

Feminists who defend the value of privacy also argue that this concept and the concept of separate spheres specifically benefit women. Feminist and family law scholars generally refer to two forms of privacy: "decisional privacy"[181] and "entity privacy."[182] The former refers to personal autonomy over such decisions as abortion and family planning.[183] The second term has arisen in the family law context as a way to reconfigure family privacy based on the caretaking "function" of a

174. *Id.* at 865–66. Others have similarly defended privacy while recognizing historical problems with its application. For a more thorough critique of the public-private distinction as influenced by Marx, see Freeman & Mensch, *supra* note 68. Freeman and Mensch argue that the public-private split is "a product of cultural contingency" but recognize that privacy rhetoric is a strategy for confronting oppression and domination. *Id.* at 256.

175. Gordon, *supra* note 75, at 189.

176. *Id.*

177. Allen, *supra* note 159, at 197.

178. *Id.*

179. Ackelsberg & Shanley, *supra* note 69, at 220–22 (discussing Harriet Jacobs' account of slave life).

180. *Id.* at 220–21.

181. *See, e.g.*, Allen, *supra* note 159, at 203.

182. *See, e.g.*, Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1224 (1999).

183. Allen, *supra* note 159, at 194.

family rather than on its form.[184] Accordingly, "[e]ntity privacy... denote[s] a line of nonintervention drawn around ongoing functioning relationships. This version of privacy can provide a barrier between an entity performing family functions, such as the caretaker-dependent unit, and the potentially overreaching state seeking to impose collective standards or controls."[185] Both concepts presuppose the value of some figurative "sphere" of non-intervention and autonomy—the first for the individual, the second for the individual's caretaking relationships. Decisional privacy's benefit to women and their lives is fairly straightforward. As for entity privacy, while Fineman does not couch this concept in strictly gendered terms, it would clearly benefit women who take on the caretaking role.

Thus, liberal feminists dispute the notion that privacy inherently damages women. Allen contends that privacy and privacy at home are valuable to women.[186] She argues that privacy as a form of "restricted access" offers women a reliable opportunity for "seclusion, solitude, and anonymity" in home and family life.[187] She construes "decisional privacy" as a part of liberty and an important remedy for sexual inequality.[188]

Key to Allen's critique of MacKinnon's rejection of privacy is the idea that the "residual male domination" attached to privacy does not obviate its necessity for women to achieve "moral personhood."[189] She supports disengaging privacy from its gender-subordinating heritage involving "female modesty, chastity, confinement in nuclear family homes as traditional caretakers," and rejects the argument that women and privacy pose a paradox because "the privacy given up is not the privacy sought."[190] Allen argues that women's relationship with privacy has been troubled because they have "possess[ed] too much of the wrong kind of privacy."[191]

Some family law scholars have critiqued the use of privacy, however, for the threat it may pose to children. Barbara Bennett Woodhouse, for example, specifically critiques Fineman's entity privacy for its failure to take full account of the coercive potential of this reformulated privacy.[192]

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184. Fineman, *What Place for Family Privacy?*, *supra* note 182, at 1221, 1224.

185. *Id.* at 1224.

186. Allen, *supra* note 159, at 197, 203.

187. *Id.* at 207.

188. *Id.* at 203

189. *Id.* at 203, 208.

190. *Id.* at 208.

191. *Id.* Some have also suggested that privacy can be considered a theoretical defense against domestic violence. Freeman and Mensch have offered that privacy, rather than being a sword of abuse in the home, might actually be reconceptualized into a shield safeguarding women's bodies from abuse. Freeman & Mensch, *supra* note 68, at 256.

192. *See generally* Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999).

Woodhouse argues that the line Fineman draws around family function reproduces the "duty free" zone previously created by gendered notions of marital-based domestic privacy.[193] While privacy used to shield men from law's scrutiny for battering their wives, entity privacy may allow a female head of household to coerce her child under the guise of family autonomy.[194] Woodhouse argues that the inherent inequality between child and parent, epitomized by the child's lack of "exit options"—like divorce in the marriage context—renders entity privacy tantamount to "conferring unregulated authority on the dominant member within this closed community of persons."[195]

Woodhouse is unpersuaded by Fineman's assurance that entity privacy does not tolerate abuse and that the shield of privacy will dissolve if the entity "grossly fails in the performance of its responsibilities or if the underlying relationship is itself dissolved."[196] Woodhouse contends that these assurances sidestep her underlying concern with the child's rights by failing to identify how a caretaking unit might dissolve, apart from state or parental action, given that a child cannot initiate its dissolution.[197] Such a paradigm fails to respect the individual rights of the dependent child. Moreover, Woodhouse contends, the "gross failure" standard merely reinforces the dominant family member's power by allowing her to engage in clearly wrongful conduct that might not meet the standard.[198] Woodhouse is concerned with the hard cases, ones involving conflicting perspectives, not just egregious ones.[199]

Woodhouse's critique stems from her commitment to the idea that children's unequal status in the family is a basis for coercion and abuse.[200] Her advocacy of a "trusteeship" paradigm for conceiving of the parent-child relationship aims to enforce parental responsibility in lieu of viewing parenthood merely as a collection of rights.[201] In what she characterizes essentially as a question of "whom do you trust?" she sides with the state as a "means to moderate" caretakers' "extraordinary power."[202]

193. *Id.* at 1254.
194. *Id.* at 1254–55.
195. *Id.* at 1253–54.
196. *Id.* at 1255 (quoting Fineman, *What Place for Family Privacy?*, *supra* note 182, at 1223).
197. *Id.*
198. *Id.*
199. *Id.* at 1256.
200. *See id.* at 1255–56.
201. *Id.* at 1256.
202. *Id.*

IV. MOTHERHOOD AND THE PUBLIC-PRIVATE DISTINCTION

Historically, cultural expectations of women as mothers and wives have been central to social understandings of the private, domestic sphere.[203] Biological sex and women's reproductive capability give rise to these cultural expectations insofar as they "naturalize" social assumptions that women's social role is to be mothers, that women are particularly well suited to this role, and that women's relationships to their children are qualitatively distinct from children's relationships with fathers or other caregivers and thus deserve special status.

Nicholson arises against the backdrop of judicial ambivalence about the role biology should play in allocating parental rights and obligations. On one hand, the past thirty years have witnessed a formal commitment toward gender neutrality in allocating the benefits and duties associated with parenthood. Recent case law suggests, however, that biological sex-based expectations of motherhood persist. By explicitly acknowledging that the term "mothers" in the *Nicholson* class action was not limited to biological mothers and that a range of caregivers may enjoy a robust parental privacy, the court disaggregates caregiving and biology. In doing so, *Nicholson* pushes the boundaries of the "mother-child" relationship at the core of domestic privacy and thus chips away at the private home's gendered foundation.

This Part sets forth the critical and judicial context surrounding *Nicholson*'s expansive view of the "mother-child" relationship. First, I explore tensions between an overall formal judicial movement toward gender neutrality in parenting cases with recent expressions in case law privileging biological sex-based motherhood norms. Next, I bring selected feminist critiques of biological sex-based accounts of motherhood to bear on judicial perspectives on motherhood. I do so to highlight *Nicholson*'s modernized approach to the parent-child relationship at the core of family privacy.

A. JUDICIAL PERSPECTIVES ON THE MOTHER-CHILD BOND

Nicholson's approach to the mother-child relationship contrasts with the persistence of biologically-derived social understandings of motherhood reflected in recent case law. Formally, gender neutrality governs judicial decisionmaking about parental rights and child custody,[204] but the purported gender neutrality of these decisions still gives way to traditional expectations of a distinct bond between mother and child. The formal recognition of the parental rights of unwed fathers

203. Siegel, *supra* note 104, at 2126.

204. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (invalidating on equal protection grounds statute creating presumption of parental unfitness of unwed father, as compared to unwed mothers or married fathers); *Ex parte* Devine, 398 So. 2d 686, 693, 696–97 (Ala. 1981).

(vis-à-vis mothers or married fathers) and the dissolution of the "tender years" doctrine in custody cases holds little sway against "naturalized" norms of motherhood, as reflected in recent case law.

The aspiration toward gender neutrality in parental rights and custody cases finds its origin in the seminal case *Stanley v. Illinois*, in which the Supreme Court invalidated an Illinois statute evincing a presumption that an unwed father was an unfit parent.[205] The plaintiff's two-pronged equal protection claim challenged classifications distinguishing between unwed fathers and unwed mothers and those distinguishing between unwed fathers and married fathers.[206] In holding that procedural hearings were required to determine parental fitness, the Court plainly recognized the potential parental rights of unwed fathers.[207]

The dissolution of the "tender years" doctrine, replaced by the "primary caretaker" presumption, further demonstrates the judicial move toward gender neutrality.[208] In 1981, reflecting a trend among courts, the Alabama Supreme Court in *Ex Parte Devine* invalidated the "tender years" presumption, in which mothers were presumed, in the absence of evidence to the contrary, to be the proper custodial parents to young children.[209] The court did so on equal protection grounds, holding that the "tender years" presumption represented an unconstitutional gender-based classification, which discriminated between fathers and mothers in child custody proceedings solely on the basis of sex.[210] The court objected to the "presumption of fitness and suitability of one parent without any consideration of the actual capabilities of the parties."[211] Moreover, the classification imposed "legal burdens upon individuals according to the 'immutable characteristic' of sex."[212]

The *Devine* court relied heavily on the Supreme Court's 1979 decision in *Caban v. Mohammed*, in which the Court invalidated a New York statute that permitted an unwed mother, but not an unwed father, to block the adoption of her minor child simply by withholding consent.[213]

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205. 405 U.S. at 657–58.

206. *Id.* at 646 (summarizing the plaintiff's argument "that since married fathers and unwed mothers could not be deprived of their children without such a showing [of being "an unfit parent"], [the plaintiff] had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment").

207. *See id.* at 658.

208. Prior to the "tender years" presumption, which favored mothers in custody disputes, common law gave fathers automatic parental rights. "Under English common law, fathers had an absolute right to ownership and control over their children." Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 656 (1992). Paternal possession came under scrutiny starting from the latter part of the nineteenth century. *Id.*

209. *Devine*, 398 So. 2d at 696–97.

210. *Id.* at 695.

211. *Id.* at 695–96.

212. *Id.* at 696.

213. 441 U.S. 380, 381–82 (1979).

The Court rejected the mother's argument that the distinction was justified by a fundamental difference between maternal and paternal relations.[214] The *Devine* court relied on *Caban* for its assertion that "maternal and paternal roles are not invariably different in importance."[215]

The formal preference for gender neutrality illustrated by *Stanley* and *Devine* contrasts starkly with recent cases in which the Supreme Court still relies substantively upon biologically-based stereotypes about the mother-child bond. For example, the Court's 2001 decision in *Nguyen v. INS* relies heavily on the type of gender classification to which prior cases so strenuously objected.[216] The statute at issue addressed the citizenship rights of children who were born outside the United States to unmarried parents, only one of whom was a U.S. citizen.[217] The statute created a gender-based classification, allowing children of citizen mothers to obtain U.S. citizenship more easily than children of citizen fathers.[218] In *Nguyen*, the plaintiff was born in Vietnam to unmarried parents—a U.S. citizen father and a non-U.S. citizen mother.[219] After being convicted of a crime in the United States, the plaintiff claimed U.S. citizenship to avoid deportation.[220] Although the child had lived with his citizen father, the Court upheld the statute and denied him citizenship.[221]

The Court held that the classification did not violate the Equal Protection Clause, as it substantially furthered two important governmental interests: (1) "the importance of assuring that a biological parent-child relationship exists," which is not as evident with fathers as it is with mothers;[222] and (2) "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent."[223] The Court observed that a mother is more likely to develop such a relationship with a child, given that "[t]he mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and

214. *Id.* at 389.

215. *Devine*, 398 So. 2d at 695. (quoting *Caban*, 441 U.S. at 389). Courts have replaced the "tender years" presumption with the "primary caretaker presumption." *See, e.g.*, Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

216. 533 U.S. 53, 62–63 (2001).

217. *Id.* at 56–57.

218. *Id.* at 59–60.

219. *Id.* at 57.

220. *Id.*

221. *Id.*

222. *Id.* at 62 ("In the case of the mother, the relation is verifiable from the birth itself.").

223. *Id.* at 64–65.

child to develop a real, meaningful relationship."[224] The Court distinguished the mother's opportunity from the father's: "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father."[225]

B. CRITIQUE OF THE "NATURALIZED" VIEW OF MOTHERHOOD

Critics of "naturalized" or "essentialized" notions of the mother-child relationship, such as those embodied by *Nguyen* or the now discarded "tender years" presumption, point to the gender- and class-based inequity inherent in such presumptions.[226] These "naturalized" or "essentialized" views flow from seemingly self-evident or self-justifying gender roles based on biology.[227] Thus, custody rules are often predicated on the "domestic ideology that recognized a mother's socially productive labor in raising future citizens."[228] Moreover, they are class-salient, insofar as they reinforce an ideology of the propriety of middle-class women as the conduit of this cultural and social reproduction.[229] While the "tender years" presumption has fallen out of favor, an idealized view of the mother-child bond persists, based in part on the view of this relationship as "a matter of biological inevitability."[230]

According to Fineman, although "the tender years" presumption represented a welcome move away from the paternal presumption previously conferred by English common law, it presented problems for feminists, as it subsumed women's interests under the mantle of a patriarchal system of cultural reproduction.[231] A view of the special relationship between mother and child certainly was not without its benefits—it was based on the idea that women had special, positive qualities—but it predicated women's ability to enjoy these "custodial rights on their submission to patriarchal norms such as fidelity, temperance, and so on."[232] Fineman contends that, for these reasons,

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224. *Id.* at 65.

225. *Id.*

226. The feminist critique of law's essentialism is based on the notion that the law contains categories that treat women's "characteristics" as natural or based on biology without consideration for the social, political, and legal constructedness of this female "identity." *See, e.g.*, Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 15 (1994) ("One is a critique of false generalizations or universalisms. Much of feminist jurisprudence... has been directed toward exposing the extent to which the law's supposedly objective norms reflect male interests and male points of view."). *But see* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 683 (2001) (defending traditional parental rights doctrine, according biological parents, particularly mothers, parental status alienable only voluntarily or upon proof of unfitness).

227. For a fuller discussion of "essentialism," see KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007–09 (2d ed. 1998).

228. Fineman, *Neutered Mother*, *supra* note 208, at 657.

229. *Id.*

230. *Nguyen*, 533 U.S. at 65.

231. Fineman, *Neutered Mother*, *supra* note 208, at 657.

232. *Id.*

"these apparent gains may be better understood as consistent with the dominant paternalistic rhetoric of the time."[233]

The dangers of an idealized notion of motherhood lay in the patriarchal framing of fitness for motherhood. Fineman contends that, although the move toward a maternal presumption initially challenged patriarchy, the radical promise of this move faltered: "Individual men had to relinquish some control over the private or domestic sphere, in that they did not retain an absolute right to their child's custody, but the basic structures as well as the ideological underpinnings of the system remained patriarchal."[234] For example, women's roles in the domestic sphere remained constant, and the new custody rule, in fact, provided another avenue through which women's domestic conduct could be regulated.[235] Accordingly, the threat of unfitness assured that women stayed the proper wifely course of conduct—sexual indiscretions, such as adultery, cohabitation, and same-sex sexual orientation, rendered women unfit.[236] The "tenders years" presumption, while departing from the couverture-based paternal presumptions that were dominant prior to the latter part of the nineteenth century, still enforced a patriarchal view of women's role in marriage and in the family.[237]

Although explicitly gendered treatment of the mother-child relationship has formally subsided, *Nguyen* illustrates the persistence of gendered social meanings attached to women's biological ability to bear children. *Nguyen*'s reliance upon biology as the basis for the mother-child relationship contrasts with the Court's determination that unwed U.S. citizen fathers must demonstrate a relationship with their children before citizenship rights may obtain. Critics of *Nguyen* view this "[e]ssentialized or naturalized" approach to gender as a means to construct national identity while reinforcing gender stereotypes.[238] Apart from the nation-building consequences for national citizenry formation, gender-based differential citizenship cases like *Nguyen*[239] reflect the persistence of biologically-based perceptions of motherhood.[240] The case

233. *Id.*

234. *Id.*

235. *Id.* at 658.

236. *Id.*

237. *See id.* at 657–58.

238. Kif Augustine Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 98 (2000) (conducting comparative legal analysis of different treatment of men and women in transmission of citizenship to children by looking at court decisions in United States, Japan, and Bangladesh).

239. *See, e.g.*, Miller v. Albright, 523 U.S. 420 (1998) (affirming the additional proof-of-paternity requirement for citizenship by birth whenever the citizen parent of a child who is born out of wedlock and abroad is the child's father rather than the mother).

240. *Cf.* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1004–05, 1049–50 (2002) (critiquing *Nguyen* for using "natural" differences to justify different legal treatment of men and women).

implicates feminist critiques of such naturalized views of motherhood, insofar as such views subordinate women in both the private and public spheres.[241] These views contrast markedly with *Nicholson*'s less gendered approach to the parent-child relationship.

V. RECONSTRUCTING PRIVACY

Nicholson's approach to privacy fuses the standard feminist critique of the public-private paradigm with the liberal defense of privacy. The case embraces the feminist critique of the public-private divide by inhabiting the space feminists have carved out for legal intervention into domestic violence. The court does so by considering the "public dimensions" of the case insofar as it addresses the widespread and systemic social, political, and psychological dynamics associated with domestic violence and child welfare protection. *Nicholson* also exemplifies liberal feminism's commitment to privacy, but takes into consideration the doctrine's gender-subordinating past by rooting privacy in family relationships or the parents' caretaking relationships with their children, rather than in patriarchal hierarchy. *Nicholson* suggests a way of bridging the gap between the feminist critique of the public-private divide and the feminist defense of privacy.

Radical feminism and family law perspectives, however, provide further ways to consider whether this less gendered form of family privacy is able to avoid wholly its heritage of inequality. The case's version of the public-private divide, even detached from gender, raises questions about whether an insistence on privacy is necessarily susceptible to further abuses (i.e., of children's welfare).

In this Part, I conclude that while *Nicholson* provides a useful example for a feminist embrace of both the public-private critique and the values of privacy, the case leaves open questions about how best to draw lines of non-intervention to avoid coercive effects.

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241. *See generally* Fineman, *Neutered Mother*, *supra* note 208. *Nicholson* also arises against the backdrop of scholarly ambivalence about the significance of differences between men and women for the feminist legal theory agenda. Apart from critiquing the essentialism of conventional legal theory, feminist legal theorists have directed the anti-essentialist critique inward. *See* Bartlett, *supra* note 226, at 15–16. Katharine Bartlett has summarized the three ways in which feminist legal theory itself has been vulnerable to the anti-essentialism critique, insofar as it propagates (1) "feminist essentialism" ("feminists, too, often presuppose a particular privileged norm—that of the white, middle class, heterosexual woman—and thereby deny or ignore differences based on race, class, sexual identity, and other characteristics that inform a woman's identity"); (2) "the 'naturalist' error" ("treating 'woman' as a self-explanatory, natural category and assuming that once certain 'man-made' or false forms of oppression are removed women will find their 'true' identities accepts the mistaken view of truth as absolute, findable, and final"); and (3) "gender imperialism" ("feminists give too much primacy to sex as a basis of discrimination and too little to other forms of oppression, such as those based on race, class, and sexual orientation"). *Id.*

A. Rejecting the Historical Public-Private Dichotomy

Nicholson's vigorous engagement with the systemic and social context of domestic violence and child welfare, and its concern with the subordinating effects of the custody removals at issue, reflect a commitment to the feminist public-private critique that fueled the domestic violence movement.

The *Nicholson* court devoted much attention to the historical background surrounding domestic violence and child welfare to place legal intervention into these problems in context, thus making the case for such intervention. The court noted that the "high levels of domestic violence today observed by the law appear to be a product of increased societal concern."[242] The court acknowledged past lack of societal interest, quoting a UNICEF report on domestic violence against women and girls: "'[W]hen the violation takes place within the home, as is very often the case, the abuse is effectively condoned by the tacit silence and the passivity displayed by the state and the law-enforcing machinery.'"[243] The court described the historical development of public awareness of domestic violence through battered women's activism in the 1970s and 1980s.[244] It then noted the prevalence of domestic violence across class, ethnic, racial, religious, educational, sexual orientation, and geographic boundaries.[245]

The court further supported the suitability of legal intervention against domestic violence by discussing the social dimensions of domestic violence. According to a 1984 study cited by the court, "domestic violence was the leading cause for which women sought medical attention, more common than auto accidents, mugging, and rapes combined."[246] The court also noted the study's conclusion that "the behavior of social workers and health service workers was a direct, albeit inadvertent, contributor to women's sense of being trapped in abusive relationships."[247]

The court's description of ACS's custody removals as "pitiless double abuse"[248] demonstrates a recognition of the punitive effects of such practices, which falls in line with the subordination-based understandings of domestic violence advanced by feminists. Couching the custody removals as punishment for domestic violence victims' limited agency, Judge Weinstein stated, "[t]he limiting factor on what a battered mother does to protect herself or her children from the batterer

242. Nicholson v. Williams, 203 F. Supp. 2d 153, 193 (E.D.N.Y. 2004).
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* (citation omitted).
247. *Id.*
248. *Id.* at 163.

is usually a lack of viable options, not a lack of desire."[249] The decision then cited expert testimony asserting that the typical domestic violence victim is far from passive but actively seeks to protect herself and her children in the face of limited "concrete and effective remedies available from agencies of social control or other institutions."[250]

Nicholson also implicates discourse on the social construction of motherhood as predicated on the duality between "good mothers" and "bad mothers."[251] Removal policies reflect the judgment that battered mothers who allow their children to witness violence have failed to be "good mothers," notwithstanding their status as victims of domestic violence. Such policies deny the physical, social, psychological, and economic damage inherent in domestic violence and embrace instead the narrowly gendered expectation of "good mothers" as all-sacrificing.[252] Custody removals resurrect the long-discredited question: "Why doesn't she leave?"[253] Removals for failure to protect not only assume battered mothers' agency but impose upon them a special standard of care as mothers and deny their status as victims. Removal policies impose on women an expectation of a sort of "super" agency.[254] Such policies reflect the relatively higher expectations placed on women for child care and rearing and impose the responsibility for abuse on battered women rather than on their abusers.[255] Thus, parental termination policies impose gender-based expectations of the proper behavior of domestic violence victims and inequitably punish battered mothers for their abusers' actions. *Nicholson* thus recognizes that the very policies that assume victims' agency based on socially constructed norms of ideal motherhood actually undermine these mothers' agency.

Once a mother has been categorized as a "bad mother," the law fails

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249. *Id.* at 200.

250. *Id.* at 200–01 (quoting expert witness' transcript).

251. *See* SCHNEIDER, *supra* note 87, at 153 ("[T]he mother, not the father who commits the violence, is likely to be held responsible for child abuse or neglect either because of her presumed failure to protect her child or because of her silence"); Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 289–300 (2001) (exploring the cultural assumption that mothers are "all-sacrificing," "all-knowing," and more "nurturing" than fathers); Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 590–91 (1998) (discussing the dominant ideology of "good" motherhood in the context of criminal failure-to-protect prosecutions); Dunlap, *supra* note 5, at 523, 528–29.

252. SCHNEIDER, *supra* note 87, at 152 ("Our culture constructs two kinds of mothers—'good' mothers who are self-sacrificing and 'bad' mothers who do not conform to that stereotype.").

253. *Id.* at 77–79 (criticizing the societal focus on why battered women do not leave their batterers).

254. *Id.* at 157 ("Society expects mothers to transcend their victimization and to act on behalf of their children, regardless of their own situation.").

255. *See* The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 865–66 (2000) (urging systemic changes to ensure that batterers, rather than battered mothers, are held culpable).

to see how her actions can indeed be considered "rational" insofar as they are guided by her interest in her own and her children's safety. Blanket removal policies fail to account for the ways in which battered mothers do indeed make "choices" for their own and their children's protection.[256] Often viewed as "irrational," battered mothers do make rational choices, which are often mistaken for inaction or as "failures" to protect.[257]

The court in *Nicholson* maintained that custody removals reinforce the power differential between the abuser and abused by blaming the victim for "failing to control a situation which is defined by the batterer's efforts to deprive [the victim] of control."[258] Accordingly, such practices ultimately reinforce the batterer's power in the household.[259] Policies like ACS's reinforce the subordination enacted by domestic violence by distributing unequal burdens between victims of domestic violence and their batterers.[260]

Moreover, the court noted, custody removals reinforce the power differential between batterer and battered by chilling domestic violence reporting.[261] According to expert testimony, "when a mother believes that if she reports domestic violence her children's well being will be endangered because they will be removed from the home and put in foster care, then she is unlikely to report the violence until it reaches an extreme level where public notice is unavoidable."[262] Accordingly, custody removal practices aggravate domestic violence "by discouraging women from reporting it at early stages."[263] The court's approach is consistent with domestic violence scholars' and advocates' criticisms of failure to protect removal policies on grounds that they will chill reporting.[264]

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256. *See generally* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223 (2001) (discussing the "decisions" that battered women make through their experience of domestic violence to highlight battered women's "agency"). *See also* Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect Their Children from Abuse*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299, 325–26 (1998) (suggesting use of a "rationality" standard to evaluate battered mothers' actions on behalf of children's safety).

257. Chiu, *supra* note 256, at 1259–60; Melner, *supra* note 256.

258. Nicholson v. Williams, 203 F. Supp. 2d 153, 201 (E.D.N.Y. 2004).

259. *Id.*

260. *See generally* Dunlap, *supra* note 5 (discussing ACS's punitive treatment of battered mothers, as exemplified by *Nicholson*).

261. *Nicholson*, 203 F. Supp. 2d at 204.

262. *Id.*

263. *Id.*

264. "Failure to Protect" Working Group, *supra* note 255, at 857 (arguing that removing children from nonabusive mothers' care will discourage battered mothers from seeking legal or social service assistance); Goodmark, *supra* note 5, at 25–28 (discussing chilling effect of threat of custody removal on domestic violence victims' willingness to seek legal assistance).

By focusing on the social and power dimensions of domestic violence and custody removals, the court in *Nicholson* embraced the space the feminist critique of the public-private paradigm has carved out for legal intervention into domestic violence. The decision implicitly acknowledged the public's role in shaping the problem and reflects a conscious commitment to the role of law and the state to remedy it. Moreover, the court's focus on the limited choices open to domestic violence victims implicates scholarship about the social construction of motherhood and its role in cultural expectations of how mothers—including domestic violence victims—should behave. Accordingly, the court's focus on victims' agency is consistent with critical discourse on the social construction of mothering norms lying at the heart of the traditionally gendered public-private dichotomy.

B. Protecting Privacy

Nicholson commits to a privacy reconfigured apart from its gender-coercing origins. In keeping with liberal feminism, *Nicholson* assumes that privacy is important in domestic violence victims' and women's lives and advances a form of privacy that protects the caretaking relationship between parent and child that does not have to—but often does—fall to women. *Nicholson* does more than merely turn a blind eye to privacy's questionable past. The court's focus on the caretaking relationship between mother and child removes the focus of domestic privacy on marriage or the naturalized norms of motherhood and attempts to provide a remedy for the power differential that occurs between batterer and battered when the latter is also a caretaker.

The court distinguishes its use of privacy from its historical uses as a tool of patriarchy by locating it within a tradition of parental autonomy and family integrity and by using the term "mother" and "parent" liberally to include caretakers who are not biologically female parents.[265] The relationship at the core of the family privacy around which the court thus draws a line of non-intervention is the parent's caretaking relationship with her child—not the parent's biological relationship with the child or the social meanings attached to this biological relationship. This line differs in content and scope from the traditional, patriarchal line—the crossing of which fueled the domestic violence movement—and resonates with the caretaking entity-based privacy Martha Fineman advocates as a means to ensure autonomy for family "function[]" rather than "form."[266]

At the same time as it distances privacy from patriarchy, the court turns privacy into an antidote to gender subordination. The court situates

265. *Nicholson*, 203 F. Supp. 2d at 164, 235.

266. Fineman, *What Place for Family Privacy?*, *supra* note 182, at 1221.

the custody removal challenges brought by the *Nicholson* plaintiff mothers in the context of historical abuse of women in the home.[267] Specifically, the court points to the ways in which custody removals can exacerbate the power differential between batterers and custodial parent victims.[268] Such reasoning supports the liberal justification of privacy as particularly valuable to women because it protects their autonomy.[269]

C. Reconstructing Privacy: Possibilities and Limits

While *Nicholson* presents a possibility for bridging differing feminist perspectives on the public-private distinction to avoid harms to women, it is not entirely clear that the court's approach protects children's welfare adequately. The court's approach to family privacy leaves unaddressed how best to weigh parents' and children's interests when the harm to children—or its absence—might not be as straightforward as the court deemed in *Nicholson*. Underlying this uncertainty is family privacy's assumption that parents' interests equal children's within the domestic sphere.

In this section, I argue first that it is possible to tease out a privacy unencumbered by patriarchy. I then argue, however, that even a family privacy stripped of its gendered trappings remains vulnerable to parental abuse to the extent that it favors parental control at children's expense. In addition, over-reliance on privacy in the failure-to-protect context may curb interventions that fall short of overreaching custody removals but aim to address the emotional harms children may experience from

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267. *Nicholson*, 203 F. Supp. 2d at 193–94.

268. *Id.* at 201.

269. *See* Okin, *supra* note 80, at 128 ("Both the concept of privacy and the existence of a personal sphere of life in which the state's authority is very limited are essential."); Allen, *supra* note 159, at 206 ("A degree of personal privacy is an important underpinning of a workable, humane family and community. It is also an important underpinning of female personhood.").

I do not mean to suggest, however, that biological male abuse of biological women is the only form of domestic violence. Privacy may still serve as a defense against patriarchy if we separate biological sex from gender and approach domestic violence as a phenomenon of "male" gendered power and oppression over "female" gendered victims. Scholars of same-sex domestic violence have written about domestic violence as gendered even when abuser and abused are of the same biological sex. *See, e.g.*, Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. Cal. Rev. L. & Women's Stud. 81, 92 (2003) (arguing that domestic violence is "gendered violence" insofar as "battering" is an aspect of the "'socially constructed' (gendered) man's behavior, which can be committed regardless of the biological sex, sexual orientation or sexual community of the offender." (quoting William Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender and the Law, 262–67 (1997)). The abuser, even when she or he is of the same biological sex as the abused, takes on a socially constructed "male" role of aggressor toward the abused, replicating patterns of power and domination originating in patriarchy. *Id.* Elder abuse and female violence against males are also significant issues. *See generally* Lynda Aitken & Gabriele Griffin, Gender Issues in Elder Abuse (1996); Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 Kan. J.L. & Pub. Pol'y 249 (2003).

domestic violence.

1. De-gendering Privacy

Radical feminists who reject any reliance on privacy to ground women's rights claims might argue that relying on family privacy reinforces a dichotomy that is inherently coercive and patriarchal. As *Nicholson* aptly demonstrates, however, it is possible to separate privacy from its gendered past. *Nicholson* ultimately succeeds in using privacy as a means to protect the interests of mothers who are domestic violence victims without reproducing the gender-subordination of past privacy applications.

Assuming we value some sort of distance between the individual and the state, rather than complete identification of the two, *Nicholson* provides a compelling example of how to reconcile feminist rejection of the coercive uses of privacy with privacy's more affirmative forms. Although privacy has traditionally been misused to confine women, the notion of privacy has intuitive appeal more generally, especially in light of the historical absence of privacy for many socially vulnerable groups.[270] Indeed, feminist scholars who have deconstructed the public-private paradigm have not suggested disposing of privacy or the notion of division of spheres, and many have carefully distanced themselves from any such suggestion.[271]

Nicholson prompts further thought about what kind of privacy we can and should retain. Family privacy surrounding the caretaking relationship between mother and child provides an opportunity to counter the power imbalance in domestic violence situations. This privacy is distinguishable from the hierarchical marital privacy that historically shielded wife abuse. Moreover, this privacy does not derive from the assumption that women—by virtue of biology—are always and must be "mothers" in this caretaking role.[272]

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270. *See supra* text accompanying notes 163–71.

271. *See supra* text accompanying notes 137–52.

272. Although *Nicholson* successfully protects the interests of members of both plaintiff classes (the mothers and children), the case's approach to family privacy might be vulnerable to criticism insofar as it rests on precedent espousing a strong preference for parental authority. This preference could theoretically conflict with child protection interests and thus reproduce the hierarchical domestic privacy to which feminists have objected in the marital context. *See* Woodhouse, *supra* note 192, at 1257 ("[T]he ideology of privacy may obscure and condone injustice to children, as it obscured and condoned injustice to women . . . ."). Woodhouse argues that strong family privacy leaves children vulnerable to parental coercion that damages children's selfhood but fails to reach levels sufficient to trigger meaningful judicial scrutiny. *Id.* at 1251–58. These concerns are certainly well placed. Upon closer inspection, however, *Nicholson*'s approach is much more limited than Fineman's "entity privacy" to which Woodhouse objects, only arguing for application of strict scrutiny to state interventions that threaten the core of family privacy—the custody relationship. *Nicholson*, 203 F. Supp. 2d at 245. Even then, the case's approach allows custody removals when they appropriately advance state interests. *Id.* Moreover, the court's definition of the mothers' class clearly contemplates an array of state interventions short of removal to address harms to children. *Id.* at 165, 232–33, 254–

The de-gendered reconstruction of family privacy in *Nicholson* speaks to an even larger question: whether and how to proceed with categories vulnerable to deconstructive critique. The anti-domestic violence movement is indebted to the deconstructive insights of the feminist critique of the public-private divide. Does this deconstructive project mean, however, that these categories are not "real"? Feminist defenders of privacy contend that it has value, despite its misuses against women. Reliance on privacy in light of the public-private critique may be viewed as an example of "strategic essentialism,"[273] whereby one acknowledges the social construction of particular categories, yet uses them for strategic reasons, *i.e.*, as tools for social change. But this description does not fully capture the richness of dialogue about privacy and the critique of it that *Nicholson* triggers. *Nicholson* poses the possibility that the deconstructive critique of the public-private distinction presents an opportunity to reconstruct categories that might not be "real" but nonetheless might have instrumental or even normative appeal in women's lives.

Nicholson presents one example of how the feminist critique of the public-private dichotomy might coexist with privacy-based claims for individual rights. It stands for the proposition that privacy comes in many aspects and that beneficial forms may survive a troubled past—at least from a gender equality perspective.

2. Reconstructing Hierarchy

The success of *Nicholson*'s family privacy is less clear, however, when viewed through the child welfare lens. Feminist objections in the gender context to the public-private distinction, based on the license that division confers on the more powerful members of private units, apply with equal force to the child protection realm. Family privacy is

56. The class was limited to cases in which children were not physically harmed, threatened with harm, or neglected by the nonbattering custodian, and where "protection of the children and their best interests can be accomplished by separation of the alleged batterer from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian." *In re* Nicholson, 181 F. Supp. 2d 182, 183–84 (E.D.N.Y. 2002). The court demonstrates its commitment to addressing harms to children from witnessing domestic violence by discussing the best practices for addressing the intersection of child maltreatment and domestic violence. *Nicholson*, 203 F. Supp. 2d 200–05. The family privacy in *Nicholson*, accordingly, is not boundless. The approach contemplates and encourages interventions short of removal to address child protection concerns. Even as to custody, family privacy is subject to "wide limits," especially in the face of "compelling" state interest. *Id.* at 164, 245.

273. *See* Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography, in* IN OTHER WORLDS 197–221 (1987). Gayatri Spivak's phrase "strategic essentialism" refers to the strategy of using racial categories, which have otherwise been criticized as socially constructed, to fight discrimination. It has been described as using essentialism to fight essentialism. *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1775 n.80 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

susceptible to critique insofar as it may rely on a hierarchical view of the parent-child relationship and thus under-serve interests in child protection by assuming that children's interests align with their parents' interests. Closer examination of *Nicholsons's* family privacy prompts us to consider whether privacy is merely the traditional "privacy game" with different players involved.

Nicholson's family privacy is susceptible to critique insofar as it confers a sphere of noninterference on parents or caretakers, whether or not they are mothers, thus redrawing a circle of impunity, specifically to children's detriment. Rather than inscribing a gendered unit within this sphere, family privacy in general shields the parent-child relationship from state intrusion—or accountability. Child welfare scholars like Woodhouse have critiqued Fineman's "entity privacy," akin to *Nicholson*'s family privacy, because it is open to abuse by parents or caretakers who may act unchecked except in only the most exceptional circumstances.[274] Woodhouse argues that the "ideology of privacy may obscure and condone injustice to children, as it obscured and condoned injustice to women."[275] Using privacy to protect family entities may merely reproduce the hierarchical structure that characterized gender-subordinating privacy.

Nicholson bases its family privacy in large part on the rhetoric of parental control, which may be viewed as a license for parental coercion. It refers to "parental authority" as a key component of the family privacy liberty interest upon which its due process analysis is based.[276] The court states that forced separations effected through custody removals threaten parents' "fundamental interest in the authority to control the raising of their children."[277] The *Nicholson* court's attempts to clarify that deference to parental authority, however, does not justify child abuse. Indeed, the court states that even when strict scrutiny applies to regulation of familial rights, such scrutiny would give way in the face of a "particularly compelling" state interest.[278] The court is also careful to frame parental autonomy as subject to "wide limits."[279]

It is not clear, however, whether this compelling interest standard, or Fineman's "gross failure" limit on "entity privacy,"[280] would protect children's interests adequately given that it assumes parents' interests should prevail *ex ante*. A default rule in favor of parental autonomy might tip the balance in favor of parents at children's expense more often

274. *See* Woodhouse, *supra* note 192.
275. *Id.* at 1257.
276. *Nicholson*, 203 F. Supp. 2d at 236.
277. *Id.*
278. *Id.* at 245.
279. *Id.* at 164.
280. Fineman, *What Place for Family Privacy?*, *supra* note 182, at 1223.

than not without addressing why parental interests should prevail as a categorical matter. This compelling interest approach does not account for those child welfare concerns that might not rise to the level of "particularly compelling" state interests but still implicate children's interests in autonomy and protection. For example, to the extent that the contest between harms from removal and harms from witnessing is actually closer than that presented in *Nicholson*, reliance on family privacy could bar helpful interventions that fall short of automatic custody removals but sensibly aim to address the possible emotional harms from witnessing, such as required counseling or even safety planning. Moreover, a norm of robust family privacy in the failure-to-protect context could chill these less intrusive government interventions by raising the specter of future litigation.

Some have suggested options for addressing children's interests while protecting the parent-child relationship. Woodhouse proposes a "relational intimacy model" that focuses on the "individual rights of adults and children as persons that gain added force by being part of mutual relationships that are reciprocal in nature."[281] On this view, parents and children are "bearers of mutually reinforcing rights against uninvited state intrusion."[282] Woodhouse suggests that her model more clearly recognizes the "personhood of children."[283]

This alternative does not wholly avoid the problem of hierarchy in *Nicholson*'s family privacy model. The rhetoric of relational intimacy may just as easily redound to parents' benefit, even as parents' interests conflict with children's well-being, so long as these conflicts do not threaten compelling state interests. Given children's inherently dependent and unequal status, such a model seems merely to draw a different semantic privacy line that could shield parental authority at children's expense.

One possibility for addressing the problem of unregulated space created by family privacy in *Nicholson* is to avoid privacy talk and more transparently allocate the rights and interests involved in the failure-to-protect context. Rather than framing the right at stake as one of family privacy, which assumes an identity of the parent-child interests, one alternative might be to frame the right at stake as purely one of the caregiver's custody right. Custody would thus function like privacy insofar as it confers autonomy on the caregiver/domestic violence victim but differs insofar as it avoids the assumption that children share the same interest in family privacy as parents.

I do not suggest, however, that custody rights should be absolute.

281. Woodhouse, *supra* note 192, at 1260.
282. *Id.*
283. *Id.*

They should be balanced by the state's interest in child protection, with state intervention appropriate based on the strength of the government's interest in a particular situation and the fit between the interest and means taken.[284]

I offer these tentative suggestions not as a way to resolve these difficult dilemmas but to prompt further discussion of how *Nicholson* illustrates the difficulty of reconstructing privacy models that sufficiently protect equality and autonomy. Privacy rhetoric has obvious normative and instrumental appeal especially in our liberal tradition. Feminist critiques of family privacy in the gender-subordination context, however, highlight privacy's potential for abuse in the child welfare context, depending on how and whether we draw lines of immunity from state regulation.

CONCLUSION

The lessons from *Nicholson*'s family privacy at the crossroads of gender subordination and child welfare protection are two-fold. In the context of feminist debates about the utility of privacy rhetoric vis-à-vis gender equality, *Nicholson* presents a compelling example of how privacy rationales may protect women from gender-subordination in the domestic sphere. *Nicholson* thus bridges competing feminist perspectives on privacy by rearticulating it apart from its gender-subordinating past. The court's family privacy approach in the domestic violence context thus demonstrates how the feminist critique of the public-private dichotomy might coexist with privacy-based claims for individual rights by using privacy as a means of promoting domestic violence victims' autonomy.

While *Nicholson* escapes the trappings of the public-private dichotomy's gendered past, the case's family privacy is vulnerable to criticism, however, insofar as it appears to reinforce the type of hierarchy feminist scholars have identified in the gender context—but this time between caregiver and child. *Nicholson* suggests that reliance on categories like "public" and "private" inherently threatens to reproduce inequality within family relationships. The case's child welfare implications indicate that norms of privacy might fundamentally collide with those of equality insofar as the rhetoric of privacy-based non-intervention often leave the less powerful vulnerable within private

284. One concern raised by this framing of the right at stake is that "custody" also reproduces an ideology of parental domination over children. I am sympathetic to these concerns but suggest this narrower framing as a way to balance the domestic violence victims' rights to autonomy and protection from government coercion with children's interests in protection—all with an aim toward keeping families together. I offer this as one suggestion for a more transparent allocation of interests or rights that attempts to place value on family unity while recognizing the disunity that can exist when parents do not act in children's interests.

spheres. While it is possible to build in safety valves to protect these individuals within private spheres in the most straightforward cases, *Nicholson* invites further consideration of how best to handle the controversial ones.

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